THE NEW-YORK
CITY-HALL RECORDER.

VOL. III. *For June*, 1818. NO. 6.

At a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 1st day of *June*, in the year of our Lord one thousand eight hundred and eighteen—

PRESENT,

The Honourable
CADWALLADER D. COLDEN, *Mayor.*
REUBEN MUNSON, and GEORGE B. THORP, } *Aldermen.*
HUGH MAXWELL, *District Attorney.*
JOHN W. WYMAN, *Clerk.*

GRAND JURORS.

JAMES BAILEY, *Foreman.*

ISRAEL LEWIS.	DAVID L. HAIGHT,
W. DE FOREST,	ISAAC JONES,
SAMUEL CAMPBELL,	THOMAS B. JANSEN,
ROBERT BARNES,	DAVID JACQUES, Jun.
RICHARD BERRIAN,	DAVID A. CUMMING,
PHILIP GRIM,	MOSES CODDINGTON,
JAMES HEARD,	JOTHAM SMITH,
THOMAS HEWITT,	JOHN VREELAND,
WALTER W. HEYER,	THOMAS C. TAYLOR,
SAMUEL HARPER,	WILLIAM BAYARD,

PHILIP HONE.

(VIOLENT ASSAULT AND BATTERY—PRESUMPTIVE INTENT.)

HENRY B. HAGERMAN'S CASE.

GRIFFIN and PRICE, *Counsel for the prosecution.*
MUNRO, ANTHON, BOGARDUS and VAN WYCK, *Counsel for the defendant.*

The public prosecutor is not bound to bring on a case for trial, until the last day of the term next after that in which the indictment was found; at which time, if the defendant has been ready for trial, and no sufficient cause be shown on the part of the prosecution, the court may discharge him from his recognisance, or from prison.

Matter, not admissible in justification of an assault and battery, but which goes merely in mitigation of the punishment, will not be received by the court, on the traverse of an indictment for that offence. Such matter should be laid before the court by affidavit only.

The law raises a presumption of an intent to kill, in a case where the means used by the assailant were such as, in all human probability, would have produced death; and where, had it ensued, such killing would have been murder.

But, where an aggravated assault and battery was committed, under such circumstances that, had death ensued, it would have been murder on the part of the assailant; still, if it does not positively appear that any dangerous weapon was used, or that the means or manner, employed in the commission of the offence, were such as were calculated to produce death, the jury are not bound to impute to the defendant an implied intent to kill.

In a prosecution for an assault and battery, the court will receive affidavits in mitigation of the punishment, from the defendant, after conviction, and affidavits in aggravation on behalf of the prosecution: but if no affidavits in mitigation are presented, or, if so, withdrawn by leave of the court before inspection, affidavits in aggravation will not be received except for some special cause.

When affidavits in mitigation are received by the court, the prosecutor has no right to demand their inspection, or reading, to enable him to prepare counter affidavits; but should the court be in want of information relative to any matter disclosed in the affidavits, on either side, the court will hand back the affidavits, confining the parties to particular points.

The defendant, one of the gentlemen of the bar, during the term of April last, was indicted for an assault and battery, committed on William Coleman, on the 9th day of April, then instant, and for the same offence, with an intent him, the said Coleman, to kill, murder, and destroy.

The less offence constituted the first count in the indictment, and the greater the two other counts.

On the arraignment of the defendant, Price informed him that the cause would be brought to trial during the term. The defendant suggested that the charge in the two last counts was, to him, unexpected: that he had not had an opportunity of consulting counsel; and that the ferment of the public mind was so great, and prejudice so strong against him, that he did not believe an impartial trial could be had during the term.

The mayor said that the reasons stated

were insufficient : that the court could regard no matter for postponing the trial, unless disclosed by the usual affidavit, and that, unless sufficient cause, in that mode, be shown, the public prosecutor might proceed to tria during the term.

On the last day of the term for trying causes, Price moved on the case. Anthon read an affidavit of the defendant of the want of material witnesses, and the cause was postponed until the following term.

On the 7th day of May, Munro and Anthon, on the part of the defendant, stated to the court that he was ready for trial, having procured a great number of witnesses ; and the counsel moved that the prosecution proceed, or that he be discharged from his recognisance. Griffin and Price said that the prosecution was ready on the last day of the last term and the first day of this, and the defendant was not ready : The application on his behalf at this time, was novel and very extraordinary. The public prosecutor never could be forced to trial ; and the defendant, even had he not moved to postpone the trial last term, would not be entitled to his present application until the last day of this.

The recorder so decided, and ordered that the defendant should continue under his recognisance.

On Thursday, the 14th day of May, Price again moved on the case.

The recorder stated to the counsel, that by reason of the public duties of the mayor, out of court, the business, in both the mayor's court and sessions, had devolved on himself, and he had been on the bench three months. He was, therefore, much exhausted ; insomuch, that he was certain he could not bear the fatigue of a long trial, as this would most probably be. This, with other reasons stated by him, rendered it impossible he should hear the cause that term. It was, therefore, postponed until this term, and on Wednesday, the 3d instant, it was brought to trial.

Munro moved, that the defendant, on the first count of the indictment, be allowed to withdraw the plea of not guilty, and substitute its opposite. The motion was not opposed, and was granted by the court.

Price opened the case by stating, that the indictment charged the defendant with committing an assault and battery with intent to murder ;—that by his plea of guilty to the count for an assault and battery, the inquiry of the jury was now to be directed only to the intent with which it was committed ;—that the defendant was a young man, an inhabitant of this city, a lawyer by profession, and holding the office of judge advocate in the militia, by profession and station honourable.

The complainant was, and had been for eighteen years, editor of the Evening Post, a paper well known in this city and in this country. The witnesses, he stated, would prove, that the defendant attacked Mr. Coleman in a most outrageous manner, in one of the public streets of our city ; that he approached him, unaware of an attack ; that with some deadly weapon, he knocked him down, and while he lay bleeding in that situation, beat him until he was completely helpless ; that his victim escaping for a while, retreated to the middle of the street, where the attack was again renewed ; that the complainant then tottered to the opposite side of the way, but that the cruelty of his assailant was not yet appeased ;—that pale, feeble, bleeding, he again escaped to the middle of the street, whither the defendant again pursued him, repeating the blows, until, after having satiated his vengeance on his exhausted and almost lifeless victim, he retired from the scene, boasting of the gallantry of his exploit.

That the intent, in all cases like the present, must of necessity be a legal inference from the circumstances ; for the mighty malice which then rankled in the heart of the defendant, was known to omnipotence only.

It would appear from the testimony, that the commencement and progress of the attack were inhuman ; and that the groans and the blood of the complainant, ought to have satisfied his assailant that he had endangered his life. By persisting, therefore, in his cruelty at such a time, he could not, on this occasion, escape the inference, that his intent was to murder. That the defendant had, in a recent publication, attempted to justify his conduct, by alleging that Mr. Coleman had published a libel concerning

him. That every word and letter of that alleged libel, as the counsel had been instructed to say, would be proved strictly true.

The mayor here interrupted Mr. Price, and stated, that it was questionable whether any evidence could be received as to that publication. Without declaring any opinion on the point, he would prefer, that no notice should be taken of such proof, until he should hear an argument as to the propriety of its admission.

The counsel then stated to the jury, that he would now produce the evidence, and then call upon them, as guardians of the public peace, to pronounce whether the *law* was to retain its dominion in the community, or unrestrained violence prevail among us.

William Coleman, on being sworn as a witness for the prosecution, testified, that on the 9th day of April last, at about four o'clock in the afternoon, he set out to go from his house, at 30 Hudson-street, to his office in Pine-street. He went through Chapel street, turned up Murray-street, and was proceeding along that street towards Broadway. He crossed Church-street; after which, the first thing he was sensible of, was, that he found himself on the pavement, on his hands and knees. It was like waking from a dream. He saw no person approach him; and while in this situation, he neither saw nor felt any thing. When his recollection had come to him in some measure, he felt some person beating him, and as the witness thought, with a club or loaded whip. He thought it was through some mistake; and not being able to speak, turned up his face, that he might be known. He still felt the blows upon his head and face, upon which he attempted to rise; but it was some time before his eyesight was sufficiently restored, to enable him to see from whom the blows proceeded; but, in a short time, he discovered they were from Henry B. Hagerman.

The witness believes, that, by reason of the repetition of the blows, he became again, for a moment, disordered. Afterwards, the witness, who was then faint and bleeding, saw the defendant a few yards distant, who returned to him once more, and beat him over the head and eyes with the lash of a whip, until he appeared exhausted; when he left him, saying something the witness did not understand.

A mob soon collected, and the witness was carried into the grocery of Mr. Stewart, at the corner of Church and Murray streets, where he was revived by drinking some brandy and water, and attempts were made to stop the blood until medical aid could be obtained.

The witness sent for Dr. Hosack, who was not at home. Dr. Watts was called, and Dr. Hosack soon after coming, the witness was by them carried home in a hack; where he was bled very copiously, and put to bed; where he was confined, having a fever, about three days.

The witness, previous to the attack, had not seen Hagerman on that day, or even for three years before, and did not know he was in the street.

There were nine wounds behind on the head and three in the face. The witness, at the commencement of the attack, neither heard nor saw the defendant, nor did he, the witness, feel the blow which produced the fall. Besides, there was a bruise on the thigh and bruises on the elbows, which the witness supposed were caused by falling. These bruises were black and blue. The cuts on the face the witness thinks he received from the lash of the whip, when he was in the middle of the street.

Price. Mr. Coleman, had there been any quarrel between you, or had there been any publication in your paper concerning Hagerman within a week previous to the attack?

By his honour the Mayor. Mr. Price, the court have already intimated that any testimony concerning any publication could not be received. You perceive that this question would open to the counsel for the defendant a large field for discussion. You had, therefore, better reserve the question at present.

By one of the Jurors—(to the witness.) While you was in the middle of the street, was you beaten with the lash-end of the whip?

Answer. Yes; but I think that the wounds on the back of the head could not have been produced with the lash-end of the whip.

Price. Have you the hat which you wore at the time?

Answer. I have. (The witness here produced a hat which was nearly new, with a large indentation on the left hand side of the crown, behind, as though a heavy blow had crumpled it inwards.)—The witness stated, in relation to the hat, that it was of the American manufactory; and that, as he understood, a hat of that description, instead of being broken by a heavy blow, like one of a foreign manufactory, would, like the one produced, give and not break.

On his cross-examination, the witness stated that his mode of walking was generally with his eyes directed to the pavement, but he thinks that he generally sees three yards ahead in walking.

Benjamin Haight, on being sworn, testified, that, on the afternoon of the affray, he was in a gig with another, and while turning from Broadway to go down Murray-street, he cast his eyes down that street, and saw, nearly opposite to the house of Dirck Ten Broeck, at the corner of Church and Murray streets, one man beating another who appeared to the witness to be down. The witness, at first, knew neither of the parties. As he approached, he perceived one was Mr. Coleman, who rose and staggered over or inclined towards the middle of the street. Mr. Hagerman, who was at some short distance, came up and beat him again. He reeled over to the side of the street opposite that in which he was beaten while down, where he was beaten again by Mr. Hagerman, who then left him and retreated a few steps, when he returned and beat him again, and, on leaving him, and after inflicting the last blow, said, "Take that, you damned rascal, for publishing lies about me."

The witness did not perceive with which end of the whip the blows were inflicted in the first place; but in the middle of the street, and on its opposite side, the blows were given, with much severity, with the lash-end of the whip.

No by-stander interfered to interrupt Mr. Hagerman. At each of these several attacks, there was a complete separation between the parties, four or five feet. Mr. Coleman acted without intelligence, as if stunned, and made no resistance.

Munro inquired of the witness whether he supposed that Mr. Hagerman intended to murder Mr. Coleman.

Griffin objected to this inquiry, because this was a matter of inference to be drawn by the jury from the facts.

The Mayor so decided, and the question was waived.

The witness further stated in his cross-examination, that he did not interfere, because he did not consider there was occasion: he regarded it as a common horse-whipping, except the blows were inflicted with much severity. Some of these were struck parallel with the ground, and some vertical; and the principal part were over the head and shoulders. The whip was a blue cowhide, and appeared to be of an ordinary size. The witness, while in the carriage, did not know that there were wounds on Mr. Coleman's head.

Cornelia Ten Broeck, on being sworn, stated, that she resided at the corner of Church and Murray streets, and the afternoon of the affray she was sitting at the east window of her house, and was roused by a groan from the street. She went to the window, which was shut, and saw a person lying on the pavement, whom she afterwards understood to be Mr. Coleman, the crown of whose head was cut open. Another person was beating him. Mr. Coleman appeared to be stunned, and turned his head and was attempting to rise—his head being towards the witness. The blood was dropping from the back of his head on the pavement, and the same day she saw marks of the same on the pavement and in the area. The blows were given with as much force as they could be. Mr. Coleman appeared to be insensible: he finally rose and staggered into the middle of the street, where he was followed and beaten on his bare head the whole way by Mr. Hagerman, with as much force as he could strike. The crown of Mr. Coleman's head and his face were bloody when he rose, and Mr. Hagerman must have perceived it. Mr. Coleman made no resistance, being unable. The witness could not state how many blows were inflicted on Mr. Coleman while on the ground. Being much agitated, she turned her head from the window and looked

again, and the blows were still continued.

After the cross-examination of this witness, the additional matter arising from which we deem not material, the Mayor submitted to the counsel for the prosecution, whether, at present, a further examination of witnesses relative to the same point was not a waste of time. He considered the case as it stood, clear; but it was not his province to control.

Price. We wish to examine the attending physicians, to ascertain the nature and extent of the injury.

Dr. John Watts, on being sworn, stated, that early in April last, he was sent for to see Mr. Coleman, and found him at the grocery store spoken of by the other witnesses. There were several wounds on the back of his head, one of which was a pretty large one. The scalp, at this place, was completely penetrated, and the wound was cut to the scull. Besides this, there were several other minor wounds, and some bruises. He had bled pretty freely. Dr. Hosack soon arrived, and by reason of the loss of blood, it was judged adviseable not then to take more, but to carry the patient home; where, on his arrival, sixteen or seventeen ounces of blood was extracted. He remained two or three days in bed, according to direction from the witness, who further required him to avoid conversation, and not to receive visiters. This advice and direction was given, by reason of the peculiarity of hurts, or disorders, of the head.

Griffin. Dr. Watts, what would be the probable result of such a wound on the head?

Witness. Wounds on the head are extremely dangerous; but, I should think it impossible to say what would be the result of such a wound, in such a place, without medical assistance.

Griffin. Is not a blow on the head, which would have produced such a wound, calculated to produce death?

Answer. This would depend on the instrument used: if stiff and unyielding, it might have produced a concussion of the brain; but if elastic, it would inflict only a flesh-wound. The result of my opinion, at the time of the examination, was, and I still think, that the blow by which the principal wound was inflicted, was calculated to produce death; especially from the delicate state of the patient's health. There were several wounds and bruises on his face, one being on his nose, and the other on his lip, which was cut entirely through.

The witness further stated, that he was unable to say how long the patient was confined to his house; but the physicians did not consider him out of danger in three days. There was a spitting of blood; but whether from the wound on the lip, or from the lungs, the witness does not know. But he judged the violence sufficient to have produced a spitting of blood from the lungs.

At the time of the first examination of the principal wound on the back of the head, the witness also examined the hat, and found the place of its indentation correspond with that wound; and his opinion at the time, founded on such examination, was, that the blows on the back of the head were inflicted with a club, or a cane, or the butt end of a loaded whip. The witness does not believe that the butt end of a cowskin could have inflicted the blow. The scalp, or even the scull, might be broken by a blow on a hat, which, if made of good stuff, might remain unbroken.

Dr. David Hosack, on being sworn, testified to the same facts, in relation to his being called to visit Mr. Coleman, to his condition in respect to the injury, and to the treatment of the wounds inflicted, as were stated by Dr. Watts. The witness further swore, that he has been the family physician of Mr. Coleman a number of years; and that, although his appearance indicated health, yet, he is a man of a feeble constitution, and subject to spitting blood. On examination, Dr. Watts thought it best to open the scalp on the bruises on the head, and discharge the blood; but, on consideration, that course was not pursued.

Powerful depleting remedies were applied. The witness considered the wounds inflicted calculated to produce death, especially from the predisposition of the patient; and such a beating might, even in a healthy person, have produced death; but, with proper medical treatment towards such person, the witness did not

consider it probable that this effect would have ensued. He coincided in opinion with Dr. Watts, that the principal wound could not have been inflicted with the butt end of a cowhide, but thinks that it must have been done with a heavier instrument. The patient was confined at home ten days.

On his cross-examination, the witness further testified, that he enjoined his patient to be kept quiet; and that he could not have written a letter on the following day, as the witness thinks: that although, from the remedies applied, Mr. Coleman had a temporary relief, yet the witness considered there were symptoms of danger.

By the Court. Might not the smaller wounds and bruises on the head, have been produced from blows given with a cowskin?

Answer. I thought not; and that is my opinion still. From the size and situation of the wounds and bruises on the head, I believed they were inflicted with a cane. The cut on the lip, I believed to have been made with the lash-end of a whip.

Dr. Watts, on being again called, coincided with Dr. Hosack in the opinion, that the wound on the lip was inflicted with a whip, and not with a blow from the fist: for having particularly examined the wound with the view of forming an opinion, he found that the cut was clear and not bruised, on or near the inside of the lip, next the teeth, as it would have been had a blow from the fist have produced the wound.

Here the prosecution rested.

Anthon opened the defence by stating to the jury, that, instead of using recriminatory language towards the prosecutor, the defendant would, on this occasion, appeal to their sound judgment.

By his plea, the defendant admitted a simple assault and battery, which his counsel were not prepared to justify.—The only question, therefore, for the determination of the jury was, *whether here was an intent to murder.* Though the court had very properly excluded all testimony in relation to a publication, yet, sufficient evidence had arisen on behalf of the prosecution to show what was the motive which led to the attack. The reason was disclosed at the time: for, according to Haight's testimony, the defendant said, at the time of the chastisement, "Take that for publishing lies about me."

The counsel believed that even with this testimony, the defendant might safely appeal to the jury on the question of intent. He would, however, produce witnesses who saw the affray from the commencement. He would show conclusively, that he came up at the distance of one hundred and fifty feet directly in front of Mr. Coleman, struck him with the fist in his face, and he then suddenly fell down and struck the back of his head against a railing on or near the side-walk, which fall produced the injury described by the witnesses. He rose, and, as the counsel was instructed to say, made battle with Mr. Hagerman, who retreated into the middle of the street; and blows, from a small cowskin, were continued and repeated with considerable severity. This account of the transaction the counsel believed the jury would find coincident with the relation of Mr. Haight and Mrs. Ten Broeck; and the circumstance of the blood in the area shows that the wound was inflicted by the fall against the railing.

The jury, in forming a conclusion as to the intent, were to judge not from the probable event, but from pre-existent circumstances.

Hagerman, openly and in front, attacked the prosecutor in the public street, in the middle of the day, and with a small cowskin. These prominent facts, some of which were about to be established, the counsel hoped would be kept in view by the jury, in determining whether the defendant harboured an intent to commit murder. He admits there was a violent assault and battery, but denies *the intent* attempted to be fastened on him by the prosecutor.

Gilbert Haviland, on being sworn as a witness on behalf of the defendant, testified in substance as follows:

I reside in this city, and am a cartman. I saw the affray spoken of by the other witnesses. I stood on my cart and rode along Church-street, in company with James H. Hawes, who was on his cart a short distance before me, and just as I was turning round the corner of that street, to go down Murray-street, towards

the river, on turning my head up the street, I saw Mr. Hagerman coming down, and as he got nearly opposite, and being in front of Mr. Coleman, he said something like, "You damn'd rascal," and hit Mr. Coleman, with the fist, on the right side of his face, who immediately fell with the back of his head against the railing. His hat flew off when the blow was given, and as he rose, Mr. Hagerman took from under his coat a cowhide, and struck him a number of blows over the head and shoulders: how many I cannot say.

Mr. Coleman appeared to be stunned with the fall, and appeared like a drunken man, and my first impression was that he was some drunkard who deserved a whipping; and this was the reason I did not interfere.

After Mr. Coleman rose he staggered towards the defendant, and said something which I did not hear; to which Hagerman said, "What is that you say, you damn'd rascal?" and then beat him again.

Hagerman struck all the blows with the lash-end of the whip, at a distance, as if he was afraid Mr. Coleman would take hold of him. I saw all the blows, and none were struck except with the fist, the hand, and the small end of the whip.

This was on Saturday—and on the next day I received a note from Mr. Coleman, and, in consequence thereof, on Monday I called on him and found him sitting in his easy-chair, and he appeared to be better. He asked me a few questions, and, having answered, I left him.

The note was here produced and read, and was to the following effect:

"*Sunday morning.*

"Sir—You would confer a great favour on a stranger, by calling at No. 30 Hudson-street, with your friend Hawes.

Yours, &c.

(Signed) WILLIAM COLEMAN."

On his cross-examination, conducted by Griffin, this witness further stated, that previous to the time of calling on Mr. Coleman, neither Mr. Hagerman nor any other person had called on him on the subject of his knowledge concerning the affray; but the next week the defendant, with two other persons, did call on the witness, and conversed with him, touching the affair.

When he first saw Hagerman coming down Murray-street, he was above the livery stable of John Curtis, which is on the righthand side of the street in coming from Broadway.

The witness, at the time the attack commenced, was riding very slow round the corner of Church and Murray streets, and at about the distance of sixty or seventy feet from the parties. Hawes was just before him, to whom the witness observed, that the assailant would cut out the eyes of the other.

The blow with the fist, which felled Mr. Coleman, was an under blow, or one in an horizontal direction, given on the right side of the face, though upwards; and as he fell suddenly backwards, he turned, or curled round.

The witness does not know how many blows were struck with the whip.

After the conclusion of the cross-examination, the witness said, There is one circumstance I forgot to mention. I was mistaken in saying that before I went to Mr. Coleman, no person had called on me, on the subject of my knowledge concerning this affair. Shortly after the affray took place, Mr. Maxwell came to my house to know the truth of the matter.

James H. Hawes, on being sworn, stated, that he saw a part of the affray. As he was coming round Church, into Murray street, the first thing he saw was a man falling and another beating him.—The person attacked, fell partly with his head and shoulders against the railing; and as he fell doubled up, his head being down the street. The assailant struck with no other weapon, that the witness saw, but the small end of a cowskin. At the time the witness first saw the affray, he thought the one attacked was some black man. In five or six days afterwards the witness saw Mr. Coleman, and conversed with him on the subject.

Francis Alsfeldt, a German, was sworn as a witness, and Ephraim Conrad as his interpreter. The witness stated, that Mr. John Huther and himself were coming up Murray-street from the river, on the lefthand side of the street, and saw a man on the pavement, and another beating him with the small end of a cowskin. The witness observed the person

who lay down, rise up and stagger like a drunken man ; and the witness said to Huther, " See, there is a drunken man !"

When the witness first saw the one who was down, at the distance of twenty or thirty steps, his head lay against the railing.

The witness did not interfere, because he was a stranger, and did not know the laws of the place.

Augustus Gumbold, a Frenchman, who spoke in broken English, on being sworn, stated, that his house is the next door to that opposite which the attack commenced. He came to the door, and saw Hagerman beating Mr. Coleman, who was bloody, with the small end of a cowskin. No person interfered ; and the reason the witness did not, was, that Hagerman did not appear to be in a passion. The witness, however, in his cross-examination, explained himself on this point by saying, that he did not see any thing in the conduct of the assailant that indicated an intention to commit murder.

Dr. Felix Pascalis, on being sworn, testified, that seven or eight days after the accident, he saw Mr. Coleman at his house, in bed, and he then appeared to be getting better. A blow on the head may produce a fracture of the scull, a compression or a concussion of the brain, and those were the only injuries arising from a blow on that part of the body, endangering life ; but the witness could not say, that a blow like that inflicted on the back part of Mr. Coleman's head, as described by the other witnesses, was, generally speaking, calculated to produce death.

Dr. Stephen D. Beekman, on being sworn, testified, that the wound on the lip, as described by the other physicians, might have been produced by a blow from the fist, or from the small end of a whip ; but both of the witnesses, last named, on their cross-examination, stated, that a more correct opinion could be formed concerning the kind of instrument by which a wound was inflicted, at its inception, than at any subsequent period. Here the defendant rested.

William Coleman, on being again called, testified, that eight days after he was hurt, he wrote the note to Haviland, who called at the house of the witness, and in the course of the conversation, said, that Hagerman, with two other persons, had been at his house and spent an evening, and that Maxwell had also been there.

Haviland, during this conversation, also said, that Hagerman struck the witness on the left side of his face, who inquired of him how it was possible that Hagerman should strike on the lefthand side of the face (that being next the railing) in such manner as to have brought the righthand side of the back of the head against the same railing ? To this inquiry, he gave little answer. The witness saw the police magistrates on the subject, on Saturday next after the attack. He has heard that the character of Haviland is bad.— The witness has brought a civil action against the defendant.

Price, (to the witness.) Do you think it possible that the defendant could have come in front and struck you, without your perceiving him ?

Answer. I do not think it possible ; for there was no mark of a blow on the face.

David Rogers, Balthazar P. Melick, Edgar Lang, John Van Bussum and Simon Martyne, on being successively sworn, concurred in stating the general character of Gilbert Haviland, for truth and veracity, bad. The first-named gentleman had known him ten or fifteen years ; and it appeared, he had for several years been engaged in business, in his line, for the firm of Melick and Rogers, who, by reason of some particular conduct on his part, an account of which the court excluded, he was discharged by his employers. It further appeared by the cross-examination of Van Bussum and Martyne, that there had been some difference between Haviland and themselves.

Dr. Hosack, on being again called, stated, that he did not think that any blow given in Mr. Coleman's face, which produced the wounds there, could have brought him to the ground ; for there was no mark of a fist on his face ; nor does the witness believe that the principal wound on the head was the result of a fall, but, evidently, of a blow. He examined the wounds and bruises on the head, with the view of ascertaining how they were inflicted, and found the prin

cipal one of a longitudinal form, which he does not think could have been produced by a stone.

He had also examined the railing spoken of, and does not think it possible that the wound on the head could have been occasioned by falling thereon; nor does he recollect whether their sharp edges were opposite the street.

Dr. Watts, on being again called, coincided with the last-named witness, in the opinion that the wound was not occasioned by falling against the railing. The reasons given by the witness for this opinion were,—1. That had Mr. Coleman fallen against the railing with sufficient force to have produced the wound, the additional violence which the head must have sustained when it struck the pavement, must have been much greater than it actually was. 2. The principal wound was too near the top of the head to be produced by falling backwards against the railing; that is, he must have fallen in a measure head foremost to have produced such a wound.

Dr. John W. Francis, the professor of medical jurisprudence in the university of New-York, on being sworn, stated, that he saw Mr. Coleman, and examined his wounds, on the Monday evening after the attack; and believes them calculated to endanger life. There were five or six ridges on the back of the head, running in a longitudinal direction, parallel with each other, and the principal wound extended to the skull bone.—No mark of a fist was perceptible on the face. The witness did not believe that the wounds could have been caused by a fall; and, having since examined the railings, he does not think they could have produced the effect which appeared on the head, though the large wound might have been produced by a fall against the railings.

Dr. Hosack, on being again called, stated, that he had examined the railings, and found them too old and decayed to have occasioned the wound: besides, in addition to the principal wound, the bruises were too numerous, and in such situations on the head that they could not have been occasioned by the fall.*

Joseph Desnoues, on being sworn, stated, that a short time before the attack, from the window of his office, No. 7 Murray-

---

* That the reader may the better understand the position and relative situation of several objects to which the testimony in this case relates, we think it proper to explain from an actual view which we have taken.

Murray-street runs out of Broadway to the North river, and the righthand side of the street, in proceeding towards the river, is nearly on a range with the front of the City-Hall. It is intersected at right angles by Church-street; in proceeding down which, from the eastward, on the righthand side, and on the corner of Church and Murray streets, stands the grocery store of Stewart, into which Mr. Coleman was carried. Directly opposite the store, on the lefthand side of Church-street, and at the corner of Church and Murray, is the house of Dirck Ten Broeck, Esq. a brick building, about forty feet on Murray-street, on the side of which, fronting the same street, is an enclosure, or area, about five feet wide, extending from about six feet from the corner of those two streets, about twenty-eight feet along the side-walk, which, from the railings of this enclosure to the curb-stone, is about ten feet in width, and paved with smooth, flat stones. The ground floor of this area is about three feet below the surface of the adjacent pavement.

The railing spoken of by the witnesses, consists,—1. Of a sill or foundation of wood, resting on the wall adjacent to the pavement, sloping therefrom and projecting or extending, perhaps, six inches from the small part of the railing hereafter described, and being, in the part where Mr. Coleman fell, about the same height above the surface of the pavement. This *sill*, in that part, is in rather a decayed state. 2. Into the sill are inserted, or mortised, perpendicularly, at about six inches from each other, square pieces of pine or white cedar wood, about three and a half feet in height from the pavement. These are about an inch and a quarter square, and inserted in the sill in such manner that one of each their corners is directly opposite the pavement. These railings run upwards through two flat pieces of pine, also projecting outwards a few inches, being about eighteen inches apart. The heads of the railings are pared off rounding, presenting, nevertheless, their sharp edges towards the street, but ending in rather a blunt point. 3. Into the sill are also mortised pieces of some hard timber, five or six inches square; the sides of which are parallel with the street, but extend outwardly beyond the small railings, in such manner that their sharp edges might intercept any object which fell obliquely against the railings. These large squared pieces of timber run upwards above the top of the small railings, perhaps eight inches, being turned off entirely rounding at the top. But below the turned part, and opposite the top of the small railings, there are, on each of the large squared railings, two sharp triangular points, next to the street, formed by the square indentation made to form the base of the turned part above described. Near the place where the affair occurred, there are three of these large squared perpendicular pieces, within about three feet of each other

street, he observed Mr. Hagerman going down from Broadway, on the righthand side of the street.

He stopped a few minutes and talked with a young gentleman behind a carriage which stood below Curtis' livery stable. After the affray, the witness heard Mr. Hagerman say, "This is the way I chastise editors."

John Huther, on being sworn, stated, that, on the afternoon of the attack, he was coming up Murray-street, in company with Francis Alsfeldt, before sworn, who said to him, "See, there is a drunken man." When Mr. Coleman rose, Mr. Hagerman beat him with the cow-hide; and, when in the middle of the street, he returned a second time and beat him, saying, "That is for putting me in the papers."

Price. We think proper, on the part of the prosecution, to offer the defendant, if he will produce, from the columns of the Evening Post, the publication alleged by him to be the occasion of the attack, to prove every word strictly true, or abandon the prosecution.

By the Mayor. Mr. Price, my impression on this subject, which was intimated in an early stage of this cause, is, that this testimony cannot properly be received. The question came up, recently, before Judge Patterson, in a trial before the circuit court of the United States; and he decided that such testimony was improper. For myself, I do not feel disposed to travel one step beyond this affray.

Here the prosecution again rested.

Dr. William J. M'Neven, on being sworn as a witness for the defendant, testified, that he had seen the railings: their sharp edges were towards the street, and he believes they were strong enough to occasion the injury sustained.

Dr. John Nelson, on being sworn as a witness on the same side, testified, that he had just returned from examining the railings, which he believed strong enough to kill a man, should the back part of his head strike with sufficient force against them.

The witness had recently examined the scar where the principal wound was inflicted, and gave it as his opinion that this wound was too high on the head to have been occasioned by a fall against those railings, unless the head, by the blow on the face, had been knocked upwards.

It was further the opinion of this witness, that a doctor who had examined a wound in its recent state, was far more competent to form a correct judgment relative to the weapon with which the wound was inflicted, than one who saw it afterwards, or at a period when its scar only was left. He further testified, in general terms, that it was difficult to account for this principal wound on the head, on the supposition that Mr. Coleman was struck in the face and knocked down.

Nathaniel W. Strong, Abraham Stagg, Isaac Kip, Joseph P. Simpson, Benjamin Stagg, William Stone, Jacob Hays, John James, Alexander Denister, John Murphy, William Dodge, William H. Ireland, John Cornell, a marshal, and Benjamin Ferris, the clerk of the mayor's court, on being successively (except as related hereafter) sworn as witnesses for the defendant, severally testified to the general good character of Gilbert Haviland.

The principal part of these witnesses had known him from ten to twenty years; and many of them stated, that they would place as full reliance on his testimony, in a court of justice, as on that of any other man in society.

However, immediately after Simpson, above named, was examined, Haviland, on being again called on behalf of the defendant, further testified, that in the conversation which he had with Mr. Coleman at his house, the witness told him, expressly, that the blow which felled him was given *on the right side of his face*. To this Mr. Coleman said, "Recollect yourself—you are wrong;" and he tried to convince the witness that it was not as he had related. During the conference, Mr. Coleman claimed relationship with the witness, alleging that his (Coleman's) wife, whose maiden name was Haviland, was a cousin of the witness. Some things which took place at the time of the affray, Mr. Coleman related, and others he said he did not remember.

With regard to David Rogers, above named as a witness, Haviland stated, that the ground of their difference was of a

political nature; for that Rogers informed him that unless he voted the federal ticket, he should never ride another load for him.

Also, immediately after the examination of William H. Ireland, above named, Henry Myers and James Gray, witnesses on behalf of the prosecution, were sworn, and testified against the general good character of Haviland for truth and veracity.

After Ferris, above named, had been examined as a witness, the counsel for the prosecution believing the testimony to be closed, Griffin directed the attention of the opposite counsel to a principle of law on which the prosecution relied, as laid down by his honour the late mayor of this city, in the case of *Henry O'Blenis*, tried in this court in the term of July, 1816.—(1 Vol. of the City-Hall Recorder, p. 117.)

The principle was, that where, in an affray, the instrument or means employed by the wrong doer were calculated to produce death, and where, had it ensued, such killing would have been murder,—*there* the jury may presume or infer *an intent* to kill, though express malice be not shown.

The mayor said there was no doubt but that this was the law, and requested the counsel to read the case.

The facts in that case were briefly these:

O'Blenis, the prisoner, commenced a quarrel with, and struck Clement Haines, who, in the act of defending himself, knocked the prisoner down. Recovering, he procured a part of a board with which he commenced another attack on Haines, who wrested it away, and again threw him down. He rose, retreated a few steps, stripped himself, came at the prosecutor and made a pass at him with a knife, and stabbed him.

Price, for the prisoner, contended, that there was no proof of a felonious intent; but the late mayor, in his charge to the jury, laid down the principle, that where a man who is a wrong doer from the commencement makes use of a knife or other dangerous weapon in inflicting a wound, and where if death ensued it would be murder, either under the statute of stabbing or at common law, the jury might presume an intent to kill, though no express proof of that intent was produced.

The Prisoner was convicted and imprisoned.

Abraham W. Groesbeck, a witness on behalf of the defendant, on being sworn, testified, that he was going down Murray-street, and, at about the distance of one hundred feet, saw the commencement of the affray. In the first place, Mr. Hagerman came up directly in front of Mr. Coleman, and struck him with the fist in his face, and knocked him down.—He reeled and fell backwards with his head against the railing. The defendant then drew from under his coat a common cowskin, and struck Mr. Coleman eight or ten blows with the lash end of the whip. He stopped beating him, and Mr. Coleman rose and stood with his back against the railing, when the defendant beat him again. From this place he went towards the defendant into the middle of the street, and, while standing there, the defendant attacked him again. Mr. Coleman, in a stupified manner, said, "Why, why, what have I done?" or something to that purpose; to which Mr. Hagerman said, "I will learn you to slander me in the public papers." Mr. Coleman then uttered some inarticulate sounds like "Oh! Ho! Oh!——" and appeared stupified. During this time the defendant was striking him with the whip.

Witness cross examined by Griffin:

Question. Had you seen Hagerman before this attack on that day?

Answer. That question I don't wish to answer.

By the Mayor. I think you are bound to answer that question: it is not improper.

Witness. I did see Mr. Hagerman before the affray, and on the same day.

Question. Had you any conversation with him concerning the attack on Mr. Coleman before it was made?

Answer. I don't think proper to answer that question.

By the Mayor. Mr. Groesbeck, you must answer, or suffer the consequence. The court will take care that no improper questions are put by the counsel.

Witness. (After some hesitation.) I think that an answer to this question will have a tendency of criminating myself.

The court hereupon instructed the witness that no such effect could follow, and directed him to proceed.

He then stated, that he had a conversation with Mr. Hagerman two or three days before the affray, and he said *that he intended to chastise and disgrace Mr. Coleman.* The occurrence took place at about five o'clock in the afternoon; about a half hour before which time, the witness, at his store, saw Mr. Hagerman, who from that place went down Murray-street.

Question. Did you accompany Hagerman from your store into Murray-street?

Answer. I went down Murray-street.

Question. Why, at that time, did you go down Murray-street?

By the Court. We think that the witness may refuse to answer that question. Whether so designed or not, an answer may clearly have a tendency of criminating himself.

Question. Why did you go down Murray-street?

By the Court. (to the witness.) You may either answer that question, or refuse to answer it, as you think proper.

Witness. I shall decline answering.

Question. Did you see Hagerman standing behind the carriage, previous to the attack?

Answer. I did so: the carriage stood about one hundred feet from Broadway, and the defendant went behind the carriage to let Coleman come up Murray-street.

The witness further testified, that Mr. Coleman came up Murray-street towards Broadway, until he came opposite Dr. Mason's church, when the defendant went behind the carriage, and that Mr. Coleman was below Church-street when the defendant went from behind the carriage to meet him.

He was struck in the face by Mr. Hagerman, but on which side the witness could not state, as he was at that time at too great a distance.

For two or three days before the attack, Mr. Hagerman was searching for Mr. Coleman, for the purpose of chastising him. At the time of the attack, Mr. Hagerman had nothing, to the knowledge of the witness, about him except a common cowskin; and the witness has no reason to believe otherwise. He saw the whole affair from its commencement until its termination. Previous to the attack, and while in Murray-street, he did not see Mr. Hagerman stoop down.

Ephraim Conrad, on being sworn as a witness, testified, that he was one of the grand jurors in this court in April last, and with others of that body, waited on Mr. Coleman at his house; who, on being asked by the jurors what reason he had for believing Mr. Hagerman intended to kill him, answered, that Mr. Hagerman came up to him the second time; this being the only reason given.

Here the testimony on both sides closed.

The cause was summed up by Van Wyck and Bogardus on the part of the defendant, and by Price and Griffin on behalf of the prosecution.

It was contended, principally, by the counsel for the defendant, that it did not follow, that because, in this case, had death ensued, the killing would have been murder, that, therefore, a presumption of an intent to commit murder could be legally raised. The first-named counsel, on this point, instanced the case of a riot, in which several might be engaged, and death to one or more persons might be the result: though this might be murder, inasmuch as the perpetrators were engaged unlawfully, yet, if death did not ensue, no intent to kill could be inferred. In addition to the fact, that the perpetrator is a wrong doer, or that he is engaged in an unlawful act or business at the time of the killing, it must be further shown, that he either used a dangerous or unlawful instrument, or employed means necessarily calculated to produce death. Such was the meaning and spirit of the case relied on by the counsel for the prosecution. There the instrument was a knife; here a common cowskin.

That Mr. Hagerman attacked from behind, with an unlawful weapon, as was stated in the opening, is not shown by a single witness, and is expressly disproved by the testimony on his behalf. Upon those grounds, public opinion had been formed, and public prejudices excited by public statements from a press conducted by the prosecutor himself. But on this occasion, those grounds had utterly failed; and the

jury were to judge of the *intent*, and of *that* only, from the facts before them.

The counsel strenuously contended, that from those facts, in connexion with the time and manner of the attack, an intent to kill could not, rationally, be drawn by the jury ; and on this branch of the subject the counsel argued from, and enlarged on, the prominent grounds assumed by Anthon in opening the defence ; and which he requested the jury to bear in their minds throughout the trial, as above stated.

Had the defendant harboured a design to kill, he would have attacked in secret, and with a deadly weapon, and not in the streets of a populous city, in the middle of the day, and with an ordinary cowskin. Or, if even that design had arisen in his mind at the time of the affray, having his adversary in his power, he would have jumped upon him, and, at least, have endeavoured to consummate his intent. But he inflicted a chastisement, severe it is true, with an instrument not unlawful, and then, voluntarily, left the prosecutor.

It was contended by the counsel on behalf of the prosecution, that the facts in the case would fully justify the inference that the defendant intended to kill.—Though it had not been directly proved that he attacked the prosecutor from behind, and with a deadly weapon, yet the facts and circumstances, produced on behalf of the prosecution, fully justified the conclusion : and even admitting that the commencement of the attack was in the mode described by the opposite counsel, still, the inhumanity of the defendant, during the attack, was sufficient to fasten on him the intention to kill. Whether he made use of *an unlawful weapon* was wholly immaterial, provided *that the means employed* were calculated to endanger life.

The principal circumstances in this case, as affording evidence of this intention, the counsel classed under four distinct heads :

1. The design of the attack was premeditated several days before it occurred.

2. There was a disparity in age between Mr. Coleman and the defendant. The former was weak and feeble ; the latter young and athletic.

3. The lying in wait for his adversary, and,

4. The attack from behind.

On these several topics the senior counsel for the prosecution expatiated at considerable length and with severe animadversions.

The mayor, in his charge to the jury, stated to them, that whatever may have been the excitement of the parties immediately interested in this cause, or of the numerous auditors who had crowded the court room during the trial, he trusted, that the court and jury would be able to discharge the duties of their respective stations free from any prejudices, partiality or bias. He felt a confidence that the jurors would not be influenced in their determination by any extraneous matters.

It would be the duty of the jury to lay the publication, stated by the counsel as having given rise to this controversy, entirely out of view.

The counsel for the prosecution had placed this case on a wrong ground.—They had treated it as though a personal wrong, to an individual, was to be redressed ; but the jury would bear in mind, that this court is not constituted for the purpose of remunerating for any injury a witness may have sustained.—Here, the redress of public wrongs is the only legitimate object on behalf of the prosecution.

The defendant is indicted for a simple assault and battery, and is charged in the two last counts of the indictment, with the same offence, coupled with an intent to commit murder.

The assault and battery is admitted ; and the principal question in the case for the jury to determine is, whether he intended to commit murder.

There are two species of intent recognised by the law, as applicable to this case :

1. The intent may be premeditated or actual, as in a case where threats or menaces are used previous to the commission of an offence.

2. There may be a constructive or presumptive intent ; as, where the evidence of an actual intent is wanting, but some means are employed in the commission of an offence from which the intent may be rationally drawn. This kind

of intent is always a matter of inference for the jury.

In this case, there is no evidence of a premeditated intent to commit murder; and if we are to rely on the testimony of Mr. Groesbeck, as evidence of an actual intent, the contrary appears; for it is expressly proved by that witness, that the defendant declared that his design was that of chastising and disgracing the prosecutor.

Independent of this testimony, which is positive, there is not only the want of evidence of a premeditated design to kill, but there are other important features or circumstances in the case, which go far in evincing that the defendant did not harbour this design previous to this attack. He armed himself with a common cowskin, and made the attack in the day time in one of the streets of our city.

In the opinion of the court, should the verdict in this case depend on the actual intent, the jury could not rightfully find the defendant guilty.

But, as the court has already stated, there is, in the law, a constructive intent to be inferred by the jury from the facts and circumstances in the case: As, where a man, in an attack, makes use of means which, in all human probability, might have produced death,—where he arms himself with a pistol, a sword or a knife, and commences an attack and inflicts a wound calculated to endanger life, there the intent to kill shall be inferred. And this is the principle of the case, decided in this court, read from the book and relied on by the counsel for the prosecution.

Here his honour briefly stated the prominent facts in that case.

Let us, in the case before us, (continued he,) recur to the means employed by the defendant in this attack: It is not insisted by the counsel for the prosecution, that if the defendant had used a cowskin, merely, in an ordinary manner, that this would have afforded evidence of an intent to commit murder. Aware of this, they have endeavoured to infer from the evidence produced that a stone or some dangerous weapon was used by the defendant in the commencement of this attack. How far the facts and circumstances in the case will warrant this inference, are matters solely within the province of the jury.

But it is further contended, on behalf of the prosecution, that even admitting that the defendant employed no dangerous weapon, still, the means employed in this attack with the whip, afford a presumption of an intent to kill.

It is said on this branch of the subject, that, as the prosecutor was of delicate health and was weak and feeble, that such an attack was peculiarly calculated to endanger his life: but the court is unable to perceive how this consideration can affect the question, for there is no evidence in the case that the defendant knew the constitution of the prosecutor, or the state of his health.

But it is further insisted, on behalf of the prosecution, that the facts in the case will warrant the inference that the defendant made the attack with the butt end of a whip; and that the inhumanity of his conduct, during this affray, shows that he intended to commit murder.

Admitting that the defendant did strike with the butt end of the whip, this circumstance, in itself, would not afford evidence of an intent to kill. But the jury in determining this point, (should they consider it important in enabling them to arrive at the intent,) by recurring to the testimony on behalf of the defendant, to which the court will presently direct their attention, will find that the lash end of the whip only was used during this attack.

The court, however, will not say that blows inflicted even with the small end of a whip, under some circumstances, would not evince a determination to kill. For if the party should inflict blows with such an instrument for that length of time, and with that unexampled severity, as to demonstrate his inhumanity and utter want of feeling, the jury might, under a view of all the circumstances, presume such determination. And if in this case the facts will warrant such presumption, the jury ought to find the defendant guilty of the charge in the two last counts of this indictment.

But as it is an important question in this case, whether the prosecutor was struck from behind, it is necessary, for

the purpose of forming a correct determination, to advert to the testimony.

On this subject we have the positive testimony of Gilbert Haviland, who testifies that the attack was made in front with the fist; and if this witness is to be believed, the prosecutor, during the continuance of the attack, was not injured by the butt end of the whip.

This witness is not contradicted by any positive testimony, and, considering that no witness on behalf of the prosecution saw the commencement of the attack, it was impossible that he should be. But it is said that a combination of circumstances in this case, produced on behalf of the prosecution, afford a contradiction to his statement; and the testimony of the attending physicians is referred to for that purpose. These witnesses testify, that they examined the wounds on the back of the head, soon after they were inflicted; and it is their opinion, that they were not occasioned by the fall against the railings.

They also state, that there was no mark of a blow on the face which could have occasioned the fall.

Haviland testifies that the prosecutor fell with the back of his head against the railing.

On this subject there is some contradiction between the physicians. Dr. Hosack states that it is impossible that the wound on the back of the head should be produced by falling against the railing: for having examined it he found it incompetent to have produced them; and that the number and situation of those wounds could not have been the effect of a fall.

Dr. Watts does not think that the wounds on the head resulted from a fall; and his reasons for that opinion are, that the principal wound was too high on the crown of the head; and that had the prosecutor fallen back on the railings with sufficient force to have produced that wound, the additional injury on the head must have been greater than it actually was.

Dr. Francis on this point states, that this wound might have been occasioned by a fall against the railings; and Dr. Nelson testified, that the principal wound, though too high on the head to be the result of a fall, that this effect might, nevertheless, be produced, if the head, by the blow on the face, were struck upwards.

As the statement of Haviland, if to be relied on, is important, it is necessary that we should direct our attention to the testimony for and against his general good character. There is something in the general appearance and manner of a witness, examined in a court of justice, calculated to impress the mind with the character of his testimony, and I must say, that I believed the general appearance of this witness evinced an intention to speak the truth.

It is insisted, however, on behalf of the prosecution, that this witness is impeached by the positive testimony of a number of others; and that the opposite testimony on this point is of a negative character. But in the view of the court this testimony in support of his character is positive; and, to say the least, this conflicting testimony is balanced.

His testimony is corroborated by Haws, an unimpeached witness, who, though he did not see the commencement of the attack, yet he saw the prosecutor falling with the back of his head against the railing, and the defendant afterwards beating him with the small end of the cowskin.

This account of the transaction is confirmed by Abraham Groesbeck, who testifies that he saw the whole affair from the commencement. It is said with regard to this witness, that his general appearance, his manner and his conduct on this occasion, have a tendency of attaching discredit to his whole statement, and that it is not entitled to belief. It is true, it may justly be said, that he has not behaved with that decorum which ought to be observed by every witness in a court of justice. But it should be considered that he may have been apprized, previous to his examination, that if he related any matter disclosed to him in confidence by the defendant concerning the intended attack, it might have a tendency of criminating himself; and to this erroneous impression, if it existed, his conduct as a witness may be fairly imputed.

The testimony of this witness is not contradicted, and if it is to be relied on by the jury, there can remain no doubt but that the prosecutor was attacked in

front, and that the attack was continued with the small end of the cowskin.

If then, the jury should be satisfied that this account of the attack, as given by these witnesses on the part of the defendant, is correct, the court is at a loss to know how this presumptive intent to kill can be rationally inferred, either from the means employed, or from the mode of inflicting the blows.

It is true, the defendant has been guilty of an aggravated assault and battery; but the evidence, in the view of the court, does not establish either an actual or an implied intent to commit murder.

The court, on this occasion, would have discharged its duty, by merely laying down the law as applicable to the case, and by adverting to this distinction between a premeditated and a presumptive intent; but in a case involving so great a variety of facts and circumstances, it was deemed useful by the court to recur to the testimony in the case, with some particularity.

The jury retired at about half after one in the morning, and in about ten minutes returned, by their foreman, Henry Eckford, a verdict in these words:

We find the defendant guilty of an assault and battery of the highest degree, but not with intent to kill.

The court directed the clerk to enter the usual verdict on the first count, and an acquittal on the two last.

On Friday, the last day in this term, for the trial of jury causes, an affidavit or affidavits on behalf of the defendant, in extenuation of his offence, having been delivered to the court, Price, on behalf of the prosecution, moved the court for the inspection of those affidavits, for the purpose of framing counter affidavits in aggravation. The counsel having a set of affidavits prepared, also moved the court that he be allowed to file them.

Bogardus contended, that as the object of affidavits in extenuation, was merely for the information of the court, the opposite party had no right to their inspection, nor had he a right to file counter affidavits, unless the court, for further information, requested him so to do.

The mayor said, that he was not conversant with the practice in such cases, and requested the counsel to refer to the authorities on the subject, and exhibit them to the court. The then present impression of the court was, that the affidavits offered should be received.—They were then delivered to the court.

Price shortly afterwards cited to the court a passage from 1 Chitty's Criminal Law, page 693, for the purpose of showing that the practice in the courts in England was, that the prosecution had a right to read affidavits in aggravation, and the defendant in mitigation. That each party must come prepared with affidavits disclosing all the circumstances of the case: that the affidavits in mitigation are first read, then the prosecutor's in aggravation, and then the defendant's counsel are to address the court in mitigation. That both parties are to have their affidavits prepared for inspection in the first instance, because the court will not, in general, receive the statement of one party first, and then admit the other to answer it, as that practice would be a perpetual temptation to perjury.

Bogardus admitted that such was the practice in England, but not in this court; and he offered to withdraw the affidavits for a short time, until, after having consulted with his associate counsel, he should have an opportunity of determining what course to pursue.

The court informed the counsel that if he withdrew those affidavits they would not again be received. The court preferred that the question should lie over until the following day, when the point of practice, in relation to affidavits in mitigation, would be settled.

The counsel for the defendant afterwards asked permission of the court to withdraw those affidavits, and leave was granted.

On the last day of the term, the mayor, before pronouncing the sentence of the court, stated that affidavits had been presented to the court in this case, both on the part of the defendant and of the prosecution.

Those on the part of the defendant he has asked, and the court have granted him permission to withdraw them.

Some difference of opinion having been expressed by the gentlemen of the bar, as to what is, or ought to be, the practice in

relation to the exhibition of affidavits of this nature, the court avail themselves of the present opportunity of expressing their opinions on this subject. It would seem, that a defendant has a right to submit affidavits in mitigation of the punishment in all cases of this nature; and where such affidavits are submitted on the part of the defendant, the court will receive affidavits on the part of the prosecution, but the prosecutor has no right to demand the reading of the defendant's affidavits to enable him to prepare others on his side.

If in the affidavits on the one side or the other, it should appear to the court that there are points which it would be proper to call on the party making the affidavit, or the opposite party, to explain, the court may hand back the affidavits, with directions which will confine the parties to these particular points. In this way the parties will be under the control of the court, and that endless war of affidavits and temptation to perjury, which an interchange of affidavits would invite, will be guarded against.

The court will not say that they will in no case receive an affidavit on the part of the prosecution, where none has been offered on the part of the defendant. But it must be some very extraordinary circumstance, and such as cannot now be anticipated, which would induce the court, after a trial and verdict, to receive an affidavit on the part of the prosecution, where none is presented on the other side. They undoubtedly never would do it as a matter of course, or without a special application to the court.

In this case, where every circumstance immediately connected with the offence has been disclosed by the witnesses examined on the part of the prosecution, the court certainly would not receive the affidavits on the part of the prosecution, if none were offered by the defendant, and the defendant, having withdrawn his affidavits before they were read by the court, it is considered that the case stands as if no such affidavit had been presented on his part. They have, therefore, not looked into or even opened the affidavits presented on the part of the prosecution. The case will therefore be decided as if there had been no affidavits on either side.

The mayor then proceeded to pronounce sentence on the defendant, to the following effect;

Mr. Hagerman, you have been convicted of an assault and battery on William Coleman. This charge, in some of the counts in the indictment against you, was coupled with an intent to kill. The jury found you guilty of the less offence, and acquitted you of the greater.

You assaulted Mr. Coleman in one of the public streets in this city, knocked him down, and, while helpless and entirely within your power, you chastised him, as though totally regardless of his situation. You renewed, and again renewed your attack, and continued the infliction of blows with a severity and to an extent unwarranted and almost unexampled.

On that occasion your conduct demonstrated an utter want of feeling: you was under the control of strong outrageous passions. You are a young man; and it is sincerely to be hoped, from your good standing in society, from the character you have hitherto, and until this unfortunate occurrence, sustained, and from the respectability of your friends and family, that you will learn to amend your conduct and govern your passions.

On the trial, your counsel insinuated, that you had been provoked to adopt this course, by a certain publication against you, which appeared in the paper of the prosecutor.

Admitting that you had been provoked, as has been asserted, this is no justification of your conduct; and I wish to impress on your mind, and hope that the audience will profit by the admonition, that whatever may have been the provocation, you should have restrained your passions.

In this community, the law is open for the redress of every injury; and if, instead of having recourse to legal measures, men, in pursuance of your example, should undertake to avenge their own wrongs, the dominion of the laws would be subverted, and disorder and confusion prevail.

Sir, there is no apology for you in the eye of the law: you are guilty; and the insinuation of your counsel in your defence, is entitled to no weight.

There is one consideration which has

had an influence with the court in lessening your punishment. It appeared on the trial, that a civil action against you, for the same offence, of which you stand convicted, is pending.

The sentence of the court is, that you pay a fine of $250, and the costs.

(CHALLENGE TO FIGHT A DUEL.)

GEORGE F. NORTON'S CASE.

MAXWELL, *Counsel for the Prosecution.*
PRICE and SHELTON, *Counsel for the Defendant.*

To write and deliver, or cause to be delivered, a letter or challenge to another, calculated and intended to incite and provoke him to fight a duel, is a misdemeanor at common law.

The defendant was indicted for a misdemeanor at common law, in writing and delivering, and causing to be written and delivered, to William Willis two certain letters set forth in the indictment, with intent him, the said Willis, to incite and provoke to fight a duel with him, the defendant, against the peace, &c.

These letters were in the words and figures following; the first of which is set forth in the first, and the second in the second count of the indictment.

Monday Evening May 18.

SIR,

I Expect You will give mee the sattisfaction of a gentleman For the insult you have put upon Mee, if you are any part of a Gentleman you will find mee Over at Brooklin at 9 o'clock To morow morning when wee can settle all Disputes Both to your and my sattisfaction if you are a Mann of corague You know what I Mean till then I Remain

GEO F NORTON

New York May 19 1818

SIR,

I thought You well enough acquainted with the reul of society to know when you recieve a note of the description of My Last that you had the chiose And appointment of place And Instruments) Enough of this parleing in the Course of the day I Expect Your Deciceve answerr pleas Appoint your time and Place and Bring your friend F

I am

GEO F NORTON

It appeared from the complaint of Willis, filed in the police office, that to the first letter he returned answer, in effect, that he did not understand it; and that in reply, he received the second.

On the trial he proved the delivery of these letters, when the prosecution rested.

Price raised a question to the court whether the sending and delivering a letter, of the description laid in the indictment, was a misdemeanor at common law. The statute was enacted for the purpose of preventing offences of this description, and unless the intent to incite or provoke the opposite party to fight was apparent, the indictment was not supported.

The mayor observed, that the statute did not take away the common law remedy, and that the intent was a matter for the jury.

Stephen Shelton, on being called on behalf of the prosecution, proved, that the defendant confessed that he had sent a challenge, and had practised with pistols to prepare to fight a duel.

The witness objected to being examined as a witness, because he was counsel for the defendant.

The mayor said, that the privilege of counsel did not extend to any time beyond that in which the offence was committed.

The witness, on being examined, proved the facts which he was called on to state by Maxwell.

The case was left under the charge of the court. The mayor instructed the jury, that it would be their duty to judge from the letters and testimony produced, whether the defendant intended, by those letters, a challenge for the purpose of inciting and provoking the prosecutor to fight a duel: If so, he ought to be found guilty.

This offence had hitherto been supposed to be confined to that class in society denominated gentlemen. Various attempts had been made by the legislature to repress so daring an evil.

It was to be lamented, and this case afforded a striking instance, that this fashionable crime was about diffusing itself among the lower and, perhaps, the most useful classes in society.

The jury would perceive that, although the defendant has assumed the character and etiquette of a gentleman, there is scarcely a word in his letters spelled right. Even the monosyllable *me* he had spelt *mee*.

In the view of the court, a crime of this peculiar description, calculated to descend from the higher to the inferior classes in society, should be checked at its first appearance, wherever it might be found to exist.

The defendant was immediately found guilty, and, on the last day of the term, sentenced to imprisonment in Bridewell for one month, and to find security to keep the peace for one year from the expiration of his imprisonment, and especially towards William Willis.

(INTENT TO RAVISH.)

JAMES GORDON'S CASE.

MAXWELL, *Counsel for the Prosecution.*
PRICE and ROSE, *Counsel for the Prisoner.*

Where a stranger entered the dwelling-house of a citizen at night through a window, and attempted to deceive the wife by representing himself as her husband, and proceeded to other acts which clearly indicated his intention, though these acts did not extend to actual violence,—on the traverse of an indictment against him, consisting of separate counts for a simple assault and battery, and also for the same offence with an intent to ravish, it was held that the jury could not rightfully acquit him of the greater, and convict him of the less offence.

The prisoner was indicted for an assault and battery, committed on a married woman in this city, and for the same offence coupled with an intent to ravish.

It appeared from the testimony, that on the 8th of June, instant, at about three o'clock in the morning, there being another woman and several children in bed with the prosecutrix, and her husband sleeping in another room, she called him by his name, Barney; when the prisoner, then being in the room, said, "I am Barney," and came up to the bed and attempted to pull down the clothes. On repeating the call to her husband with a louder voice, the prisoner escaped out of the back window. The woman then rose and awoke her husband, who saw the prisoner near the house and pursued and overtook him, but he escaped. A description of him was given by the husband to a watchman, who, during the night, apprehended him just after he came out of the window of another house in Thomas-street.

He acknowledged to the husband that he had entered his house at the window.

The defence of the prisoner was attempted on several grounds, among which were the following:

1. He is a man of good character, industrious and *religious*.

2. Being of good character, industrious and *religious*, he attended *an Irish wake*, (which was explained, in the course of the testimony, as importing the watching with a corpse,) and, according to custom, became drunk.

3. Being of good character, industrious, religious and drunk, he entered the dwelling-house of one of our citizens, *by mistake*, for a house of ill fame.

A great number of witnesses were examined to the first position, and some to the others.

Mr. Price summed up the case to the jury, and contended principally in his argument, that, as the prisoner committed no act of violence to the person of the prosecutrix, an intent to ravish could not rationally be deduced by the jury. The counsel admitted that the prisoner had been guilty of an assault and battery, and ought to be punished severely; but denied the intent imputed to him on behalf of the prosecution.

Maxwell contra.

The mayor charged the jury, that as the indictment consisted of a count for a simple assault and battery, and of another for that offence with an intent to ravish, it was in the power of the jury to find the prisoner guilty of either offence, and acquit him of the other. But in this case, considering the circumstances, the court cannot perceive how the jury could acquit the prisoner of the greater and convict him of the less offence. If the

prisoner had not the intent imputed to him, and acted merely through mistake, he ought not to be convicted of the simple assault and battery ; for he resorted to no act of violence. In the opinion of the court the offences laid in this indictment, according to the facts in the case, ought not to be separated ; and should the jury acquit him of the greater offence, they ought not to find him guilty of the other.

In examining into the intent, we must refer to the act ; and if we find it of that nature and description as must, necessarily, have resulted from the intent, we are bound to impute the one to the other.

The prisoner entered the house in the night ; he personated the husband and answered to his name, and he proceeded to other acts which clearly manifested his intention. Had he succeeded in deceiving the woman and accomplishing his purpose, he then would have been guilty of a rape ; for force is not an essential ingredient in the definition of that offence.

Should the jury, therefore, believe that he either entered this house with the design imputed to him, or, after having entered even by mistake, as is contended by his counsel, and hearing a female voice, was incited to perpetrate that design ;—in either case he is guilty of the higher charge in the indictment.

The defence attempted by his counsel was very extraordinary :

It is said that he is an industrious, moral, and religious man. In doubtful cases good character is beneficial ; but not in a clear case of guilt.

The other grounds of the defence do not comport with the character which his counsel allege that he has sustained.—This industrious, moral and *religious* man, while attending to the obsequies of a friend, an office awfully solemn and impressive, becomes intoxicated. He sallies forth, heated with liquor, invades the sanctuary—the private dwelling, of one of our citizens, and enters through a back window into the room where his wife and children are at rest. He *mistakes* this for a house of ill fame ; and yet, after this *mistake* was discovered, when he heard the wife call her husband by his name, Barney—the prisoner says, " I am Barney." And it was not until she raised her voice and roused her husband that the prisoner abandoned his design and fled.

In the opinion of the court, these facts destroy any presumption, in favour of the prisoner, arising from his character, however fair it may be.

After the mayor had finished his charge, Mr. Price requested to know of his honour whether he intended, in his charge, to instruct the jury that they *could not* find the defendant guilty of the assault and battery, and acquit him of that offence with an intent to ravish.

By the Mayor. Mr. Price, I intended to charge the jury, and I now wish them to understand, that *they have the power* of finding the verdict for which you contend; but that *they ought not to do so*, according to the facts in this case.

He was found guilty, and, on the last day of the term, after an impressive address from the court, he was sentenced to the Penitentiary two years.

(DESCRIPTION OF PROPERTY.)

CHARLES MOON'S CASE.

MAXWELL, *Counsel for the prosecution.*
GARDENIER, *Counsel for the prisoner.*

The common acceptation of the name of an article of ware among artisans engaged in its manufacture is sufficient in an indictment.

The prisoner, an old offender, (see Vol. 2, p. 192,) was convicted on an indictment for petit larceny in stealing an *unmade pair of trowsers.* On the trial Ephraim M. Whitlock, the witness for the prosecution, proved the felony, and, also, that the article stolen consisted of sufficient cloth for a pair of trowsers, cut out for that purpose and rolled up in a bundle. He also stated that the common name of cloth in that state, among tailors, was an *unmade pair of trowsers.*

Gardenier, on the trial, and also on a motion in arrest of judgment, contended that the description of property in this indictment was erroneous. The word *unmade*, applied to trowsers, was absurd; for unless made, they were not and never could be called trowsers. The proper description of the subject-matter was cloth.

Maxwell contended that the common acceptation of property, among artisans dealing in the article described, was sufficient; and that the terms *unmade* and *unfinished* were synonymous.

The mayor in his charge to the jury referred to the case of Reed Lennington, et al. (2d Vol. p. 168,) tried in this court, wherein it appeared, on an indictment for *stealing a hog*, that at the time of the felony the animal was dead and partly dressed. On an objection to this description of property in the indictment, by the same counsel now engaged for the prisoner, it was held the description was sufficient.

The prisoner was found guilty by the jury, the motion in arrest of judgment was denied, and he was sentenced to the penitentiary.

(PERJURY—INDICTMENT—VARIANCE.)

REUBEN RIDER'S CASE.

MAXWELL and VAN WYCK, *Counsel for the prosecution.*
PRICE, *Counsel for the defendant.*

The oath assigned as perjury in an indictment was, that the defendant "saw *M. G.* and *M. F.* hand a *trunk* through a window in the rear of the house of J. N. G. on the same night it had been stolen, and that he saw the same trunk handed to J. N. G. through the said window, and that he saw the said J. N. G. place the same in the smoke-house."—On the traverse of this indictment it appeared, that on the former trial the defendant swore that he saw a man on the back stoop, (whom he afterwards recognised to be J. N. G.) and *two women* at the window hand him out *something about a foot and a half long which looked like a trunk*. Though this was the subject-matter of the former trial, and was frequently referred to during its progress, it was held that the variance between the oath set forth in the indictment and the proof, was fatal.

After the testimony on both sides has been submitted to the jury in a case of perjury, they must pass thereon; and the public prosecutor will not be suffered to enter a *nolle prosequi* on the indictment.

During the term of April last the defendant was indicted for wilful and corrupt perjury, alleged to have been committed on the tenth day of April last at the sittings held in and for the city and county of New-York before the Honourable Joseph C. Yates, one of the justices of the supreme court, in a cause in which one John P. Cox was plaintiff, and John N. Grenzebach defendant.

The oath assigned, as that in which the perjury was committed, as set forth in the indictment, was in the following words: "That he the said Reuben Rider saw *Maria Grenzebach and Margaret Fritz hand a trunk* through a window in the rear of the house of the said John N. Grenzebach on the same night it had been stolen, and that he saw the same *trunk* handed to the said John N. Grenzebach through the said window, and that he saw the said John N. Grenzebach place the same in the smoke-house."

We propose, on this occasion, to present to the reader the prominent facts, which will constitute a brief history of the former as well as of this trial.

It is well known that during the war, and in the year 1814, a military force was stationed in different points of this island, and among other places at Harlaem heights, about eight miles from this city. Here John N. Grenzebach, a German, resided and still resides, keeping a grocery store and a tavern. Five officers belonging to the corps stationed at this place, among whom was Lieutenant John P. Cox, a young gentleman residing in Dutchess county, boarded at the house of Grenzebach, and had a separate room above stairs in which their trunks and other effects were deposited. The room in which they usually ate was on the basement floor directly back of the grocery; and on the rear of the building on the outside of the house there was a stoop which, in ascending, passed so near a window in the officer's room, that any object might be reached from the window to a person who might be on the stoop.

One day in the month of October, 1814, Cox received a sum of money in bank notes amounting to about $2,500, which he counted out and returned to his trunk in presence of Dr. Wheeler, one of his room-mates, and one Elizabeth Grenner, an assistant of Mrs. Grenzebach in her domestic concerns.

A short time after candlelight on the same day, Miss Maria Grenzebach, the daughter of John N. Grenzebach, and

Mrs. Margaret Fritz returned from New-York; and the former lady, after ascending the stairs, in passing by the room of the officers on the way to hers, opened the door and handed Mr. Cox a tart pie which she obtained in the city, (as he was unwell,) and passed directly to her own room and that of Mrs. Fritz for the purpose of taking off her outside coat and head-dress. While there, the officers were called to tea; and these women on their return, finding no person in the officers' room, went there and staid by the fire about five minutes. They were somewhat fearful the officers would find them in the room, and went out to go below, and met the officers on the stairs.

On going into the room, Cox found that his trunk containing the money was missing: an alarm was made, and a search instituted; but in vain. No satisfactory account could be obtained concerning the trunk until near Christmas, when two female children found it in or near some bushes at no great distance from the house of Grenzebach. On examination it was found that the trunk contained some papers and about $40 in bank notes.

When the search was instituted, a constable in Harlaem, whose name we do not remember, was employed in the business, and Reuben Rider, the present defendant, also a constable, was not engaged: and among the various places searched for the money, Rider's premises were not exempt.

A considerable time after the affair had occurred, and as we think about six months, Rider disclosed the account of the loss of the money, according to the matter alleged in the indictment, with the additional circumstances that on that evening he went to the grocery and drank with one Van Der Hoof, and after parting with him, he went on the back of the house of Grenzebach to get into a path leading to his own home, and when opposite to the smoke-house met a negro named Jack; and seeing a man on the back stoop receiving through the window something about a foot and an half long looking like a trunk from two women then in the inside, he, the defendant, asked the negro who that was, and he answered that it was Master Grenzebach; and the witness then by the light of the candle recognised Grenzebach, who took the *something* from the window, and put it in or near the smoke-house.

Upon information thus derived from Rider, combined with previous suspicions of a violent impression, an action of trover was commenced by Cox against Grenzebach for the recovery of the value of the trunk and its contents.

On the trial, in the sittings, Messrs. Ruggles of Poughkeepsie, and D. B. Ogden in this city, were of counsel for the plaintiff, and Messrs. Emmet and Riker, the recorder, and Talmadge of Poughkeepsie, for the defendant.

Rider, the defendant, was the principal witness for the plaintiff, and the only one who testified directly to the fact.

It appeared, that the black man, whom Rider alleged he saw on the back of the house, had since died.

Maria Grenzebach, Margaret Fritz, Sophia Grenzebach and Elizabeth Grenner, witnesses for the defendant in the sittings, on being successively sworn, testified in substance, that they were the only women in the house, during the evening in which the trunk was missed; and that neither of them handed any trunk out of the window to the then defendant or any other person.

A great number of witnesses testified to the general bad character of Rider for truth and veracity, and as many, if not more, of the most respectable witnesses, to the good character of the then defendant, many of whom had known him a great number of years.

Many circumstances, not detailed here, were also adduced on behalf of the plaintiff, tending to impeach the testimony of the women, and to corroborate the relation of Rider.

The cause was ably summed up by counsel, and under the charge of the court, the jury found a verdict for the defendant.

This indictment was traversed on the sixth instant; and John N. Grenzebach, and his two daughters, above named, Margaret Fritz and Elizabeth Grenner, testified, in substance, that the relation of Rider on the former trial was utterly false.

Thomas Addis Emmet, a witness on behalf of the prosecution, produced his

notes of the testimony, taken in the sittings, for the purpose of refreshing his memory, and testified, in substance, that Rider swore on the trial, that on going from the store he went on the back of the house, and when he was opposite the smoke-house met a black man, and seeing a man on the stoop, with a candle, and two women, whom the witness, Rider, did not name, at the window, handing out to the man *something about a foot and a half long*, Rider asked the black man who that was ? and he replied, that it was master Grenzebach. And Rider then, by the light of the candle, recognised him to be Grenzebach, who came down from the stoop, and left the thing handed from the window near the smoke-house.

Mr. Emmet did not remember that Rider swore it was a *trunk* handed from the window; but *that* was the subject-matter of the suit, and was understood to be the thing meant by Rider in his testimony.

On the production of this testimony, Price objected to a further prosecution, on the ground of a variance between the oath set forth in the indictment, and that disclosed in proof.

1. In the indictment it is alleged that the defendant swore that *Maria Grenzebach*, and *Margaret Fritz*, handed the trunk out of the window; by the testimony it appears he swore that *two women* did so.

2. In the indictment it is alleged, that the defendant swore that those women, *by name*, handed Mr. Grenzebach *a trunk*; by the proof it turns out to be *something about a foot and a half long*.

Van Wyck, contra, admitted the variance, but requested the court to permit a *nolle prosequi* to be entered on the indictment.

The court decided that the variance was fatal, and instructed that the indictment ought to have contained a number of counts, in which the oath alleged to be false, should have been varied in its terms, to meet the exigency of the case, as disclosed in the testimony. His honour did not think that the public prosecutor had a right, in a case like this, to enter a *nolle prosequi* after testimony has been introduced on both sides.

He advised the jury to acquit the defendant, and they did so.

(RECEIVING STOLEN GOODS.)

JOHN SHOTWELL'S CASES.

MAXWELL, *Counsel for the several prosecutions.*

PRICE and GARDENIER, *Counsel for the defendant.*

The mere finding an article stolen in possession of a party charged with receiving it knowing it to be stolen, without other evidence, is insufficient to produce a conviction.

If in such case the property alleged to be stolen be laid as the separate property of W. and on the trial it should appear that the property was that of W. and K. the prosecution cannot be sustained.

But inadequacy of price—purchasing new goods of vagabonds from appearance—concealing the goods—agitation when questioned respecting them—all or either of these, if existing, are circumstances indicative of guilt.

The defendant was charged on four several indictments for receiving stolen goods. On the first for receiving four boxes of pipes, the property of Thomas Townsend on the 14th of September last, on the other for receiving 400 pair of shoes of the value of $500, the property of George F. Wing, and on the two others for receiving one chest of souchong tea and other articles, the property of Holding & Bailey.

On the traverse of the first mentioned indictment no other testimony was produced except that the goods were stolen and found by Thomas Cornell, one of the marshals, at the store of the defendant at the Fly-market.

The court deemed this testimony insufficient to establish the *scienter*, and directed the jury to acquit the defendant.

On the traverse of the indictment for receiving goods, the property of Wing, it turned out, by the testimony of William H. Hull, that the property was purchased of him by Wing as the active partner of the firm of *King & Wing*, and that the witness received a note executed by Wing, but in the partnership name.

On an objection to this prosecution by the counsel for the defendant, the court

decided it could not be maintained, and so instructed the jury, who acquitted him.

On the traverse of the other indictments, it appeared that the defendant had been, for a long time, in the habit of receiving goods of different kinds, of vagabond looking negroes, at an inadequate value: that he carried such goods frequently to an auction to make a quick sale: that when the marshal searched some of the goods were found concealed, and that when called on by Charles Oakley, a gentleman who had lost goods found by him in possession of the defendant, he was agitated, and acknowledged that he had purchased goods of negroes whom he had reason to believe stole the goods.

Price stated that the defendant would rely on good character, and he produced several very respectable witnesses who proved his good character.

The mayor charged the jury in substance that good character in a clear case of guilt was of no avail; and that the several circumstances above enumerated, independent of the positive testimony of Oakley, were clearly indicative of the defendant's guilt.

He was convicted, and his sentence suspended.

(NEW TRIAL.)

HENRY GREEN'S CASE.

MAXWELL, *Counsel for the prosecution.*
SIMONS, *Counsel for the prisoner.*

Where the prisoner moves for a new trial on the ground that testimony was admitted on behalf of the prosecution which the prisoner can show to be infamous, the court will recur to all the circumstances of the case, in judging of the propriety of granting such motion.

The prisoner having been convicted of a felony, Simons moved for a new trial on an affidavit of the prisoner stating, in effect, that a witness, named in the affidavit, who had sworn on the trial to matters material to the prosecution, had been liberated from the state prison; and that the prisoner on the trial was unable to produce testimony of that fact.

Maxwell contra.

The mayor said that on recurring to the facts in the case, it appeared that the evidence of the felony, independent of the relation of the witness stated in the affidavit, was clear and satisfactory. No illegal testimony operated to produce a conviction; and in deciding on the propriety of granting a new trial in such case, a sound discretion ought to be exercised. The court would look to the facts and circumstances in the case.

The motion was denied, and the prisoner sentenced to the state prison for five years.

(INSURANCE ON LOTTERY TICKETS.)

CHARLES N. BALDWIN'S CASES.

To agree to pay $5, in consideration of the receipt of a less sum, if a particular number be drawn on a particular day, is selling *a chance of a ticket*, within the meaning of the act.

The defendant having been convicted on three indictments for insuring on lottery tickets, Gardenier, on one indictment, moved in arrest of judgment on the ground that the indictment charged the defendant with having sold to Cyrus Tanner the chance of ticket No. 19 in the Medical Science Lottery No. 4 for the sum of 2s. 8d. And the indictment further alleges that if that number should be drawn on the day stated, the defendant was to pay Tanner $5.

This, the counsel contended, was not *selling the chance of a ticket;* but was rather *receiving money, in consideration of repaying a larger sum*, as described in a subsequent clause of the act; and he therefore insisted that the illustration of the offence was a departure from its description in the first part of the indictment.

The mayor decided that the indictment was good. The statute mentioned chance or *chances;* the legislature never could have intended to confine it to one specific chance, and, in the view of the court, this was a chance in relation to time.

The motion was denied, and the defendant fined $250 and the costs.